IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4274 OF 2005

Bashir Ajij Shaikh & Anr. ..Petitioners.

Versus

Nivrutti Narasu Patole & Ors. ..Respondents.

Mr. R.K.Yadav i/by R.D.Sawant for the Petitioners.

Mr. N.D. Hombalkar for Respondent No.1.

CORAM : S. A. BOBDE, J.

DATED : 04TH AUGUST, 2005.

P.C.:

1. The petitioners have challenged the order of the Additional District Judge, Satara in Misc. Civil Appeal No. 61/2004 dated 06.03.2005. By the impugned order, the learned Addl. District Judge has set aside the order of the trial court, refusing injunction.

2. Originally, the civil suit was filed by the Respondent No.1 Nivrutti against the four defendants i.e. original defendants Nos. 1 to 4 in the suit.

The said suit was for partition. The original defendant No.2 - Changuna Nanu Jadhav, expired and it appears that the present petitioners Bashir Ajij Shaikh and Rubabi Bashir Shaikh have purchased the share of Govinda i.e. the original defendant No.1 the Respondent No.2 herein. Admittedly, this purchase was pending the suit. The respondent No.1 plaintiff applied before the trial court for a temporary injunction against the present petitioners, who claim to have purchased the share of Govinda while the suit was pending. This application was rejected by the trial court. Against the said rejection, the plaintiff, respondent No.2 herein, preferred an appeal before the Appellate Court and sought an injunction, restraining the present petitioners from obstructing possession and enjoyment of the plaintiff and other defendants Nos. 2 to 4 over the suit lands till the decision of the suit. This order of the Appellate court, allowing the appeal of the plaintiff, is under challenge in this writ petition.

3. The learned counsel for the petitioners submitted that the appellate court has committed a gross error of law in coming to the conclusion that the petitioners are not in possession of the suit

property. In particular, the learned counsel contended that there is evidence on record in the form of Record of Rights and the evidence in the form of affidavits of one Salim Babalal Mulla, who was the attesting witness on the sale deed, and one Ismail Imam Patel, who have stated that the petitioners are in actual possession of the land w.e.f. the date of the sale deed. On a perusal of the order of the appellate court, it is clear that the Record of Rights has been mutated on the basis of the sale deed dated 5th February, 2004. The appellate court has observed that the mutation entries are on the basis of the recital in the sale deed that the petitioners are put in possession.

4. However, the appellate court has held that there is no evidence of partition by metes and bounds of the suit property. In fact, the respondent No.1 has sought partition in the present suit. The appellate court has rejected the plea of partition made by the petitioners that the revenue record of the suit land itself shows that one and half share in the land is held by Nivarutti, the original plaintiff and Govinda, the original defendant No.1. In my view, the appellate court has rightly observed that merely

because the revenue record shows that the lands are shown as held by Nivrutti and Govinda to the extent of half share each, it is not sufficient to infer the partition by metes and bounds. It is further pertinent to note that the appellate court has found the recital in the sale deed, prima facie, not reliable in view of the fact that in the 'Sathekhat' and the sale deed it is falsely mentioned that there is no proceedings pending in any court in respect of the suit land, when in fact the present suit was pending.

5. Having regard to the settled position that unless there is a partition by metes and bounds, a co-parcener cannot claim any partition in the joint family property as his own. The appellate court has granted the injunction prayed for by the respondents. While doing so, the appellate court has referred to several decided cases. In these circumstances, I am of view that the order of the appellate court does not suffer from any error of law nor does it suffer from any jurisdictional error or otherwise. There is no merit in the petition and the same is hereby dismissed.

Dt. 04.08.2005 (S.A. BOBDE,J.)

.....